Supreme Court

OF THE

United States

October Term, 1914.

No. 46.

Appeal from the United States District Court for the Southern District of Georgia.

Brief of Appellant

Louis H. Chamlee,
Berrien Kerr,
Floyd M. Sharp,
Alex. Barrow,
Irving Barrow,
E. W. Clancy,
Solicitors for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 48

PHOENIX RAILWAY COMPANY OF ARIZONA, Appellant, vs. W. PAUL GEARY, FRANK A. JONES AND AMOS W. COLE, Members of the Corporation Commission of the State of Arizona; GEORGE P. BULLARD, Attorney General for Arizona, and FRANK H. LYWAN, County Attorney, for Maricopa County, Arizona, Appellees.	Brief of Appellant.

STATEMENT OF THE CASE.

On June 23rd, 1913, an order was made by the Corporation Commission of the State of Arizona directing the appellant to double track its line of street railway on West Washington Street in the City of Phoenix, Arizona, from the intersection of Seventh Avenue with said Washington Street to Seventeenth Avenue, a distance of ten blocks (T. R. p. 14). The order directed the construction of this double track to be commenced within thirty days from the date of the order and to be completed on or before the 1st day of September, 1913.

On July 3rd, 1913, the appellant filed with the Corporation Commission its petition for a rehearing, stating therein the respects wherein it considered said order to be unreasonable and unlawful and in violation of the Constitution of the United States. This petition for a rehearing was denied by the Commission by an order entered on August 12th, 1913, and the order denying the petition directed the work of construction to be commenced on or before September 1st, 1913, and to be completed on or before December 1st, 1913. After the denial by the Corporation Commission of its motion for a rehearing, the appellant filed its bill of complaint in the District Court of the United States, in and for the District of Arizona, praying that the order of the Arizona Corporation Commission be declared null and void and in contravention of the Constitution of the United States, and that the defendants be temporarily and permanently enjoined from in any way or manner enforcing or attempting to enforce the said order or any part thereof, and from instituting or causing to be instituted any suit, prosecution or proceeding to enforce the same or any part thereof, or for the recovery of fines or penalties on account of any violation or refusal to obey or observe said order. The bill of complaint alleged that the order of the Corporation Commission was unjust and unreasonable for the reason that the service rendered on said Washington Street by the appellant was adequate and efficient, and that the construction of the double track ordered was not required by the needs of the people using the car line on said

street; that to comply with the order would cause the expenditure by appellant of almost Fourteen Thousand Dollars ($14,000.00); that the operating expenses of appellant exceeded its revenues and that it had been operating at a loss; that it was unable to make this additional expenditure, and that compliance with the order would prevent the appellant from making a fair return, or any return at all, upon the value of its property; the bill of complaint further set forth the severe penalties provided by the statutes of Arizona for non-compliance with the orders of the Corporation Commission, and that the order in question was not within the power of the Commission to make and was in violation of the 14th Amendment to the Constitution of the United States.

Among the provisions of the statutes of Arizona prescribing penalties for violations of the orders of the Corporation Commission, as set forth in the appellant's bill of complaint, (T. R. pp. 7-11), are the following:

Revised Statutes of Arizona, 1913, Civil Code.

> "2352. (a) Any public service corporation which violates or fails to comply with any provision of the Constitution of this state or of this chapter, or which fails, oimts or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public service corporation, is subject to a penalty of not less than one

hundred dollars nor more than five thousand dollars for each and every offense.

(b) Every violation of the provisions of this chapter, or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

"2353. Every officer, agent or employee of any public service corporation, who violates or fails to comply with, or procures, aids, or abets any violation by any public service corporation of any provision of the constitution of this state or of this chapter, or who fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement or any part or provision thereof, of the commission, or who procures, aids, or abets any public service corporation in its failure to obey, observe, and comply with any such order, decision, rule, direction, demand, or requirement, or any part or provision thereof, in a case in which a penalty has not hereinbefore been proivded for such officer, agent or employee, is guilty of a misdemeanor and upon conviction thereof is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or both such fine and imprisonment.

"2354. Every corporation, other than a public service corporation, which violates any provision of this chapter or which fails to obey, observe, or comply with any order, decision, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such corporation, is subject to a penalty of not less than one hundred dollars nor more than five thousand dollars for each and every offense.

"2357. In case any public service corporation, corporation or person shall fail to observe, obey or comply with any order, decision, rule, regulation, direction, demand or requirement, or any part or portion thereof, of the commission, or any commissioner, such public service corporation, corporation or person shall be in contempt of the commission and shall be fined by the commission a sum not less than one hundred dollars nor more than five thousand dollars, to be recovered before any court of competent jurisdiction, in this state.

"Procedure had in such contempt proceedings shall be the same as in courts of record in this state. The remedy prescribed in this section shall not be a bar to or affect any other remedy prescribed in this chapter, but shall be cumulative and in addition to any other remedy or remedies."

> "2344. All rules, regulations, orders, charges and decrees of the commission shall remain in full force and effect pending a final decision of the court with reference thereto. No order staying, restraining or suspending any order, rule, regulation, charge, or decree of the commission shall be made by any court of this state."

On August 28, 1913, Judge Sawtelle of the United States District Court, in and for the District of Arizona, on the bill of complaint and affidavits, granted a temporary restraining order (T. R. pp. 17, 18) under the provisions of Section 266 of the Judicial Code, Act of March 3, 1911, chapter 231, said Act being an Act entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary" restraining the defendants as prayed in the bill of complaint and setting the hearing upon appellant's application for an interlocutory injunction for October 2nd, 1913. This hearing was later continued by stipulation of the parties and was had on November 17th, 1913, before the court convened under the provisions of said Section 266 of the Judicial Code. By the opinion of the court so convened (209 Fed. 604), (T. R. pp. 104-109), the application of the appellant was denied on the ground that the showing of the appellant as to the unreasonableness of the order of the Commission was not sufficient to prevent its enforcement pendente lite. The order denying the application of the appellant for an injunction pendente lite was entered on November 20, 1913, (T. R. p. 93).

From this order of the court denying the appellant's application for an interlocutory injunction, an appeal was taken directly to this court, under authority of Section 266 of the Judicial Code, Supra. The order of the lower court provides that the temporary restraining order theretofore granted be continued in force pending this appeal.

SPECIFICATION OF ERRORS.

The Court erred in denying appellant's application for an interlocutory injunction for the following reasons:

1. The appellant's bill of complaint and the affidavits filed in this cause showed sufficient ground for the granting of a temporary injunction.

2. Appellant's bill of complaint and affidavits filed in this cause showed that the order of the Arizona Corporation Commission, complained of in the bill of complaint, and sought to be enjoined, was unreasonable and not required by the needs of the people, and was in violation of the 14th Amendment to the Constitution of the United States by depriving the appellant of property without due process of law, and denying the appellant the equal protection of the law, and further showed that irreparable injury would result to the appellant by the denial of said injunction.

3. Appellant's bill of complaint and the affidavits filed in this cause showed that the appellant was making no return whatever upon the value of

its property, and the order of the Arizona Corporation Commission complained of and sought to be enjoined would prevent appellant from making a fair return, or any return whatever, upon the value of the property, and that said order was not within the power of the Corporation Commission of Arizona to make.

4. Appellant's bill of complaint and the affidavits filed in this cause showed grounds sufficient to require the granting of an injunction pendente lite; and further showed that the right to a final hearing would be denied appellant, and irreparable damage suffered by appellant by the refusal to grant such injunction pendente lite; and further showed that by granting said injunction pendente lite no injury would result to the appellees.

ARGUMENT.

The Lower Court Had Jurisdiction.

The jurisdiction of a Federal Court of Equity over the subject matter of this action will not, we believe, be questioned by the appellees. The order of the lower court, denying the application for a temporary injunction, was made, as is shown by the opinion and order of the court, (T. R. pp. 93, 104-109,) on the ground that a sufficient showing was not made to warrant its issuance. The jurisdiction of the United States District Court in this case is clear, for the reason that a Federal question is plainly presented by the bill of complaint. It is set forth that the order complained of unreasonably directed the appellant to make an ex-

penditure of thousands of dollars which was neither warranted by the needs of the people nor justified because of any inadequacy or insufficiency of service, (T. R. pp. 3, 4, 6.) That an order of the Arizona Corporation Commission which would thus compel the appellant, when adequate service was being provided, unnecessarily to expend a large sum of money, for which expenditure there was no public need, is contrary to the provisions of the 14th Amendment of the Constitution of the United States, which forbids a state to deprive any person of property without due process of law, will not, we believe, be seriously questioned.

> Washington ex rel. Oregon R. & N. Co. vs. Fairchild, 224 U. S. 510; 32 Sup. Ct. Rep. 535;
>
> Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission, 27 Sup. Ct. Rep. 585; 206 U. S. 1;
>
> Mo. Ry. Co. vs. State of Neb., 217 U. S. 196; 30 Sup. Ct. Rep. 461.

The bill of complaint further showed that the complainant was totally unable financially to comply with the order complained of; that it had been operating at a loss and was not making a fair return, or even any return on the value of its property, (T. R. pp. 6, 8); and that compliance with the order would make it impossible for the appellant to receive any return whatever on its property. That an order which prevents the making of a fair return is in violation of the 14th

Amendment has many times been held by this Court.

Smith vs. Ames, 169 U. S. 466;

Reagan vs. Farmers' L. & T. Co., 154 U. S. 362.

To the same effect is the case of Washington P. & C. Co. vs. Magruder et al, 198 Fed. 218.

The penalties prescribed for a violation of the order as set forth in the bill of complaint, (T. R. pp. 8-11,) likewise present a Federal question. Ex parte Young, 209 U. S. 123.

Nor can it be denied that a case was presented within the jurisdiction of a Federal Court of Equity.

Ex parte Young, 209 U. S. 123;

Washington ex rel Oregon R. & N. Co. vs. Fairchild, 224 U. S. 510;

Atlantic Coast Line vs. N. C. Corporation Commission, 206 U. S. 1;

Smyth vs. Ames, 169 U. S. 466;

Wilcox vs. Consolidated Gas Co., 212 U. S. 19;

A., T. & S. F. Ry. Co. vs. Love, 174 Fed. 59;

Love vs. A., T. & S. F. Ry. Co., 185 Fed. 321.

The Case Presented to the Lower Court Made Necessary the Issuance of an Interlocutory Injunction.

Having shown that the lower court had jurisdiction of this action, the single question now presented is whether the appellant's bill of complaint

and the affidavits filed by it, in view of the affidavits filed by the appellees, presented to the lower court sufficient grounds to require the issuance by it of the interlocutory injunction prayed for in the bill of complaint. For the reason that the other grounds stated in the specifications of error are necessarily but an elaboration of this one question and are so closely related, they do not, we believe, warrant a discussion under their separate divisions.

In taking an appeal to this court, we are not unaware of the rule which frequently has been stated, and which will doubtless be invoked by the appellees, namely, that the granting or refusal of an application for an interlocutory injunction is largely within the discretion of the trial court. While we recognize this rule, it is nevertheless true that there are well defined and established principles which must control the action of a lower court in passing upon an application of this nature, and that in view of the right of appeal expressly granted, where the order of the lower court constitutes a violation of these principles and an abuse of discretion, its ruling will not be sustained.

The cases are uniform in holding that in a case where the complaint states a good and sufficient cause of action, where the injury to the complainant will be great and irreparable in the event that the application for an interlocutory injunction is denied, and where there is a reasonable probability that the complainant will be successful on the final hearing of the cause, the application should-

be granted. We believe that in the case at bar the bill of complaint and the affidavits submitted, presented such a case to the lower court as to have required the issuance of the temporary injunction prayed for and that the denial thereof constituted such a violation of the foregoing fundamental principles, and consequently such an abuse of discretion, as to require a reversal of its decision.. In showing that the order of the lower court was erroneous, we shall discuss the showing made by the appellant in the court below as to (1) the irreparable damage which would be sustained by the appellant because of a denial of its application; (2) the lack of power under the Federal Constitution in the Arizona Corporation Commission to make the order complained of; (3) the lack of necessity and unreasonableness and, therefore, the unconstitutionality of the Commission's order by a consideration of the essential factors determining this question; and (4) the relative degree of injury to the respective parties which in view of the showing on the foregoing points required the issuance of the temporary order prayed for.

Irreparable Damage to the Appellant Was Certain to Result Because of a Denial of Its Application for an Interlocutory Injunction.

The appellant's bill of complaint and affidavits presented to the lower court a case of the attempted enforcement by the Arizona Corporation Commission of an order of an extreme and unusual character requiring the appellant to double track approximately a mile of its line on West

Washington Street in the City of Phoenix at an expense to the appellant of approximately Fourteen Thousand ($14,000.00) Dollars, and further sums in the event of paving and for maintenance. (T. R. pp. 3, 7, 25, 26, 27.) The bill of complaint sets forth the enormous penalties which are prescribed by the statutes of Arizona, (a portion of which are for convenience set forth in the Statement of Facts,) and which would be enforced in the event of non-compliance with this order. (T. R. pp. 7-11,) and it was apparent that unless an interlocutory injunction was granted, pending a final hearing on the merits of the case, the rights of the appellant would forever be concluded, and that a hearing of the merits of its cause would be forever denied. It was clearly set forth that should the temporary injunction be denied, the appellant would immediately be compelled either to expend its money in what its complaint and affidavits showed to be a needless outlay, or to suffer the enormous penalties prescribed for a non-compliance with the order. Surely in such a case, where the denial of an interlocutory injunction was certain to terminate any rights which the appellant might have and to cause it such irreparable loss, if the bill of complaint and affidavits presented a case in which there was any question of right for determination on final hearing the interlocutory injunction should have been granted and its denial was error.

In view of the great and irreparable loss which it was apparent must so surely follow the denial of the application of the appellant for an inter-

locutory injunction, if it reasonably appears from the appellant's bill of complaint and affidavits that this order was not within the power of the Arizona Corporation Commission to make, or was unreasonable or unnecessary and therefore in violation of the 14th Amendment of the Constitution of the United States, there can be no question as to the error of the court in refusing to grant a temporary writ.

The Order of the Arizona Corporation Commission Sought to Be Enjoined Was Without the Power of the Arizona Corporation Commission.

The order of the Arizona Corporation Commission requiring the appellant street car company to double track a line of its street railway is, so far as we have been able to find, without precedent, and goes, we contend, far beyond the limits of the Federal Constitution within which a State Commission must always act. As was said by this court in the case of Mo. P. R. Co. vs. Nebr., 217 U. S. 196:

> "It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads, after all, are property protected by the Constitution, and there are Constitutional limits to what can be required of their owners under either the police power or any other ostensi-

ble justification for taking such property away."

It is submitted that an order of this unusual and drastic character, which would compel the investment of this large sum of money in building new track without compensation and with no possibility of return, was entirely without the power of the Arizona Corporation Commission to make, and violative of the Federal Constitution, and that its enforcement should consequently have been enjoined as prayed.

The Order of the Arizona Corporation Commission Was Shown to Be Unreasonable and Unnecessary and Therefore Violative of the 14th Amendment to the Constitution of the United States.

Regardless of the foregoing, however, by reason of the showing made as to the utter unreasonableness and lack of necessity of the order in question, the decision of the lower court refusing to enjoin the enforcement of the order pendente lite can, we believe, in no event be sustained.

In viewing the showing of the appellant as to the unreasonableness and lack of necessity of the order complained of, the controlling factors for consideration are the character of the community to be served, the amount of traffic over this line, the financial condition of the appellant, the advantage to be gained by the public in comparison with the expense to be sustained by the appellant, and the nature and extent of the service rendered and capable of being rendered by existing facilities. State of Washington ex rel Oregon R. & N.

Co. vs. Fairchild, 224 U. S. 510; Mo. P. R. Co. vs. Nebr. 217 U. S. 196. It is held in the cases above cited, and in numerous other cases of the Federal Courts, that an order of a State Commission or a State statute, which, from a consideration of the foregoing factors, is unreasonable and unnecessary, violates the Federal Constitution and cannot be enforced.

From the sworn bill of complaint and affidavits filed in this case, it clearly appears that the order directing this double trackage was unreasonable and was not justified by the needs of the people. The community through which this line runs is shown to be a very limited and sparsely settled district. (Bill T. R., pages 2, 3 and 6; affidavit of Gould, T. R. p. 28.) The population of the entire district served by this line, as shown by the above mentioned affidavit of Gould, as taken by a careful census, was shown to be only a little more than one thousand people, and this number is not materially increased in the counter-affidavit of Price, filed by the appellee (T. R. p. 66) when we consider that allowance is there made for inhabitants of vacant houses. It further appears in the affidavit of Gould (T. R. p. 28) that more than fifty automobiles were owned by the residents of this district, and that a large part of the district is in easy walking distance of the business section of the City of Phoenix. The maps submitted as an exhibit to the affidavit of Gould (T. R. p. 28) demonstrate how widely separated are the houses in this community and how little the community is built up. As will appear from an inspection of the proceedings at the hearing

before the Arizona Corporation Commission, which proceedings are attached to the affidavit of S. H. Mitchell (T. R. 40 to 62,) no competent evidence whatever was offered to prove that the character of the community served by the line in question in any manner warranted the order for this additional trackage. It was further clearly shown that this order was not warranted or justified by the amount of traffic on the West Washington Street line. The appellant's sworn bill of complaint and affidavits showed that the traffic was extremely light, that the cars were seldom half full and were never crowded, (T. R. p. 5 and affidavits of Gould, Mitchell, Snow, Allen, Showers, Hodges and Woolstenhulme, T. R. pp. 28, 30, 32, 33, 36, 38 and 63.) By accurate records kept during the months of May, August, September and October of the year 1913, and immediately preceding the denial of the appellant's application, the number of people riding on the cars at representative points on this line is proved to have been small, and an extremely low average is shown, the cars for the most part carrying only a few passengers. (Affidavit of Woolstenhulme, T. R. p. 63.) No substantial evidence was offered at the hearing before the Arizona Corporation Commission of an amount of traffic sufficient to justify the order made by that body. (T. R. pp. 41 to 62, inclusive,) nor is anything on this subject of extent of traffic except the most vague and indefinite statements contained in the affidavits submitted by the appellees (Affidavits of Werner, Vanderwater, Boyce, Hilderbrand, Bates and Ingles, T. R. pp. 68, 78, 80, 81, 83 and

90.) The affidavit of Mr. Geary (T. R. p. 74), Chairman of the Corporation Commission, admits that the traffic for the preceding five or six months had been very light, and the other statements contained in this affidavit are for the most part based upon conjecture and hearsay, and like the other affidavits submitted by the appellees, contains nothing definite or certain upon this question.

Not only did the complaint and affidavits present a strong showing that the order of the Corporation Commission was neither justified by the character of the community to be served nor by the amount of traffic, but a strong case was also presented of an adequate and efficient service rendered and capable of being rendered without the additional trackage ordered by the Commission. If the present facilities were sufficient for the public needs, or if an adequate and efficient service could be rendered without putting the appellant to a great and needless expense, there surely was no justification for this order. Mo. Pac. R. R. Co. vs. Nebraska 217 U. S. 196, 30 Sup. Ct. Rep. 461. The question of the sufficiency of the service of a public service corporation must always be determined by a consideration of the reasonable requirements of the community and the people to be served. A service required in a populous community where traffic is heavy would surely not be required in a community such as the one with which we are concerned, viz., a thinly settled and limited district, with a scattered population largely on the outskirts of a small town of

little more than fifteen thousand people (T. R. p. 40.) The bill of complaint and affidavits filed by the appellant establish that, considering the character of the community to be served, and the number of people using this line, a fifteen minute schedule afforded a reasonable and adequate service, and this is not controverted by the affidavits of the appellee. It is further shown by the most accurate proof which affidavits can afford that this fifteen minute schedule was being and had been promptly and efficiently maintained. (Bill T. R. pp. 2, 3 and 6; affidavits of Mitchell, pp. 30, 40; Newcomer, p. 21; Gould, p. 28; Woolstenhulme, p. 63; Showers, p. 26; Trent, p. 37; Hodges, p. 38; Snow, p. 32; Allen, p. 33.)

It is shown that the cars of the appellant left the terminals on almost precise schedule time, and that there was practically no variation from the regular fifteen minute interval between cars. These facts are established both by the affidavits of those experienced and in constant and close touch with conditions, and by accurate records kept for long periods of time, (T. R., pp. 30, 31, 63, 64,) the accuracy of which proof in comparison with the vague and indefinite statements contained in the appellee's affidavits is clear. Out of thousands of times that the cars of the appellant left the terminals of the Washington Street line and passed representative points along the West Washington Street line there were but few and inconsiderable delays, and such delays as there were, are shown to have been due to causes in no way connected with the question of double trackage. It is further shown by the bill of com-

plaint and by the foregoing affidavits that even in the event that a more frequent schedule were deemed reasonable and necessary, a more frequent schedule could easily be maintained with the present trackage without subjecting the appellant to the heavy burden which the order of the Commission requires.

The affidavits filed by the appellee (T. R., pp. 68, 70, 78, 80, 81 and 83) fail to show that the service of the appellant was inadequate for the community and the people to be served thereby. It is true that in the several affidavits filed, statements are made as to occasional cases of delay. No competent evidence, however, is given that the delays mentioned were caused by lack of a double track. None of the parties by whom these affidavits were made, appear to have had any experience in street railway operation, and even though occasional delays had occurred, this does not show insufficiency of service for the community served, and there is nothing offered to show that the delays were not due to other causes, which so far as possible to be remedied can be corrected without compelling the large expenditure called for by the Corporation Commission's order.

Without considering the questions of expense and of the financial inability of the appellant to comply with the order complained of, the showing of the appellant as to the unreasonableness and lack of necessity of this order was more than sufficient to establish such a probable right and injury to that right as to have required that it be granted a final hearing in order that its rights

might be fairly and fully determined. It was, however, further shown that the appellant was financially unable to comply with the order, that it was and had been operating at a loss, and making no return whatever upon its invested capital, and that the enforcement of the order would result in the confiscation of its property. By the bill and affidavits submitted, the operating expenses and operating revenues for the several years preceding the filing of the appellant's bill of complaint are stated and the operating expenses are shown to have exceeded the operating revenues (T. R., pp. 3, 4, 6, 7, 22, 23, 24, 30 and 31.) Even from the affidavit submitted by the appellees on this point, (T. R. 87) it is clear that the appellant company had been operating without any return as no allowance is made by the statement in that affidavit for depreciation of the company's property, (T. R., p. 39.) It is shown that the company has never been able to pay a dividend, nor to pay interest on its bonded indebtedness, (T. R. 22.) It is further shown that the construction of this double trackage would add greatly to the investment of the appellant, thus making greater the rate of loss and less the possibility of any return, while the maintenance of the line would also cause material additional expense without increasing the revenue. (T. R 4.) The company would, therefore, be compelled to use up its capital in complying with this order without the possibility of any gain. This, of itself, made it the duty of the court to restrain the enforcement of this order pendente lite.

In a similar case, viz., Washington P. & C. Ry.

Co. vs. Magruder, 198 Fed. 218, 231, it was held as follows:

> "Neither under the exercise of the police power or any other ostensible justification can the property of a corporation be taken from it without compensation. Mo. Pac. Ry. Co. vs. Nebr. 217 U. S. 206, 30 Sup. Ct. Rep. 461, 54 L. Ed. 727, 18 Ann. Cases, 989.
>
> "It is true that the legislature has the right to require that a public service corporation shall furnish a needed and reasonable facility in spite of the fact that the furnishing of such facility will cost the corporation more than it will bring it. Mo. Pac. Ry. Co. vs. Kansas, cited supra; Atl. Coast Line Ry. Co. vs. No. Carolina Cor. Comm., 206 U. S. 1, 27 Sup. Ct. 585.
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> "In each of the above cases, however, the corporation concerned operated a great system of railroads. In neither did it claim that, if the increased accommodation was furnished, its total gross income from all sources would be less than its necessary expenses of operation and maintenance, without making any return whatever upon the capital invested. Such is complainant's claim. The evidence sustains it. To hold that the legislature may not by penal sanctions compel a corporation to use up its capital in the public service is not to restrict any exercise of legislative power which can in the end be effective. In the long run all attempts to secure for the public so costly a facility must prove futile, no matter what the courts do or leave

undone. If the facility cannot be furnished otherwise than by the expenditure of the capital invested, sooner or later the exhaustion of the corporation's capital will make it impossible for the corporation to render any service whatsoever."

In the case at bar, as in the case cited, it was shown that the total income of the appellant from all sources had been and would be less than the necessary expenses of operation and maintenance and that no return had been or could be made on the company's property, and that the appellant was without funds and totally unable to make the expenditure necessitated by the order of the Commission (T. R. 22, 23.) On this showing alone, it is submitted that the denial of the appellant's application for an interlocutory injunction was error.

In view of the showing made by the appellant as to the unreasonableness and lack of necessity of the order complained of, we submit that the application for this interlocutory injunction was wrongfully denied. There was clearly such a showing of right on the part of the appellant as to have required the issuance of the temporary writ.

In View of the Relative Degree of Injury to the Respective Parties by the Granting or Refusal of the Interlocutory Injunction Prayed For, the Showing of the Appellant Presented to the Lower Court Required the Issuance of Injunction Pendente Lite.

When we further consider that the cur-

cumstances of this case were such as to make a denial of the appellant's application, result in denying it a final hearing and in entirely and forever concluding and destroying the rights claimed by it, and that the granting thereof would not injure the appellees, there can, we believe, be no question as to the error of the lower court. By reason of the extreme and severe penalties prescribed for a failure to comply with the orders of the Arizona Corporation Commission (T. R. pp. 8-11,) the refusal of the court to issue an interlocutory injunction operated at once to deprive the appellant of a final hearing. In the case of Washington P. & C. Ry. Co. vs. Maguder, 198 Fed. 218, 232, the imposition of such penalties of itself was held sufficient to necessitate the granting of the injunction, the court saying:

> "The act moreover is open to further fatal objection. As did the statute declared invalid in Ex parte Young, it, in effect, seeks to deny to complainant all opportunity for judicial review of the reasonableness of its provisions. Complainant promptly sought the interposition of this court * * Whatever the cause of delay, the fact remains that if the act be valid, and if the injunction be dissolved, the complainant is liable to penalties which by this time will aggregate quite $30,000 or about one-third of what the evidence indicates complainant's road is worth."

That great and irreparable injury must necessarily result to the appellant by the denial of an interlocutory injunction was apparent. Upon the denial of the appellant's application it would,

save for its appeal to this court, immediately have been subjected to these enormous penalties with no possible opportunity for a hearing of its cause. Unless the enforcement of the order were temporarily enjoined, a final hearing would clearly be too late to save the appellant from irreparable loss.

On the other hand the granting of the interlocutory injunction prayed for would in no way have effected or disturbed the rights of the appellees. The maintaining temporarily of the case in statu quo pending a final hearing could not possibly have resulted to their detriment or injury. The rule is well established that where, as in the case at bar, there are reasonably disputable questions of law or fact for judicial determination, and where great and irreparable loss and injury will result to the complainant if the preliminary injunction is denied, and little or no injury can result to the defendant if the injunction is granted, it is the duty of the court to preserve the status quo pending a final hearing of the cause. Because of the violation of its duty in this respect, as laid down by numerous decisions of the Federal courts, it is submitted that the order of the lower court cannot be sustained.

In an application for an interlocutory injunction which is heard only no the bill of complaint and affidavits, it is necessarily impossible to present satisfactorily all the matters which will be presented at the final hearing of the cause, and in a case involving the questions presented in the case at bar, it is impossible for a court on an application of this nature fully and satisfactorily to

decide the merits of the controversy. The lower court, however, as appears from its opinion, (T. R. pp. 104-109), in disregard of the showing made by the appellant and upon the several affidavits filed by the appellees, treated the case as though it were before it on final hearing and, without giving the appellant an opportunity to have its case fully heard, rendered a decision on the merits of the case, which would terminate the appellant's rights.

We desire to refer to a few of the many cases in which are enumerated the principles which should have controlled the action of the lower court, but which were clearly violated by its decision.

In New Memphis Gas & Light Co. vs. City of Memphis, 72 Fed. 952,953, the court set forth in the following language the principles to be followed in determining whether a temporary injunction should issue:

> "It is to be borne in mind that it is not proper, on an application of this kind, to decide or to consider with a view to final decision, the merits of the controversy, especially where such merits turn on grave questions of law. It would be no more proper to do so on a motion for an injunction than on a motion to dissolve an injunction. It is consequently settled that upon a preliminary application for injunction, all that the judge should, as a general rule, require, is a case of probable right and probable danger to that right without the interposition of the court, and his discretion should then be

regulated by the balance of inconvenience of injury to one party or the other."

Similar principles are stated in the case of Sanitary Reduction Works of San Francisco vs. Cala. Reduction Company, et al, 94 Fed. 693, 696, 697, as follows:

"The argument of counsel has followed the wide range of the affirmative defenses set forth in the respondent's answer. To determine these defenses now would in effect dispose of the case upon its merits,—a result not contemplated by the rules governing courts of equity in granting preliminary injunctions. The order for such injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to preserve the existing state of things until the case has been fully heard by the court and the entry of a final decree therein; and it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the court in Ga. vs. Brailsford, 2 Dall. 402, 'A probable right and a probable danger that such right will be defeated without the special interposition of the court is all that need be shown as a basis for such an order."

The following extract from the opinion of the court in Carpenter, et al, vs. Knowllwood Cemetery, et al., 188 Fed. 856-857, is also applicable

> "An interlocutory injunction is merely provisional in its nature and does not conclude any right. Its object and effect are merely to preserve the property in statu quo until hearing on the merits. The first question to be determined is whether the case shows whether there is a substantial question between the parties. If the court is satisfied that there is not a substantial question to be tried, no injunction will issue, and on the other hand, if there appears that there is a substantial question in the case, then the court will address itself to the second question, namely the relative degree of injury which will be caused by the preservation of the property in statu quo until final hearing. If it appears that by granting this relief the injury to the respondents will be serious and the injury to the complainants slight the injunction will be refused. If, however, it appears that the injury to the complainants will be serious and the injury to the respondents comparatively slight, the injunction will be granted. (Citing Kerr on Injunctions, Second Edition, pages 1216-17, High on Injunctions, Fourth Edition, paragraphs 4, 5, 13)."

Equally strong is the language of the court in the case of Chicago and N. W. Railway Company vs. Railway Commission 35, Fed. 866, 881:

> "Other affidavits are filed showing the amount of dividend heretofore paid and the difference between the schedule of the commissioners and those heretofore enforced. Of course, I know that affidavits are unsatisfactory testimony and that it would be the height of folly to say that this testimony clearly shows that such would be the effect of this schedule, but this is an application only for a preliminary injunction and upon such application probabilities are to be considered and the injuries which result to either of the parties by the granting or refusing of the injunction."

In Irving vs. Joint District Council U. B. of Carpenters, etc., 180 Fed. 896, 900 in referring to the nature of the showing necessary to warrant the issuance of a preliminary injunction the court said:

> "Without meeting these instances of interferences catagorically the defendants object that they are stated upon hearsay and lack precision. No doubt more and better evidence would be required on final hearing, but all that is needed upon a motion for preliminary injunction is to satisfy that a cause of action exists and that irreparable injury will be done complainants unless they are protected. In such a case a preliminary injunction ought to issue."

The case of Harriman vs. Northern Security Company, 132 Fed. 464, 475 to 477, and Wil-

mington City Railway Company vs. Taylor, 198 Fed. 159, 197, 198, enunciate the well settled principles of the courts concerning this question in almost identical language. We quote from the latter opinion:

> "On the question of the circumstances determinative of the propriety of granting or withholding preliminary injunctions there are certain well settled principles. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than

would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to or widely vary in degree as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the status quo, until the question of right between the parties can be decided on final

hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the complainant. There is abundant authority in support of these views (citing numerous cases.) The application of these principles to the case in hand not only justifies but requires the awarding of a preliminary injunction. The only evidence before the court, aside from the bill and its exhibits, consists of exparte affidavits, which are inconclusive and to a certain extent conflicting on material points. The evidence, such as it is, preponderates on the side of the complainants. But the case is not ripe for final decision and to render one now would be both premature and improper. A final decision should be reached only after a thorough, orderly and rigid investigation of the facts, in connection with the law, so conducted as to allow the application of the usual and most satisfactory test of truth, namely, the examination, cross examination and re-examination of witnesses, and also the production of books, papers and accounts. Further, the 'balance of convenience or hardship' here operates in favor of the complainants."

In San Joaquin & Kings R. C. & I. Company vs. Stanislaus County, 163 Fed. 567-574, in determining whether or not a temporary injunction should issue the court, said:

"The question now before the court is whether, upon the showing made, the com-

plainant has made out a sufficient case to entitle it to an injunction to preserve the status quo until the case can be heard upon the merits, and in reaching a conclusion upon that question the court must consider the case as a whole. The argument upon the hearing took a wide range, touching questions that can only be determined upon the final hearing.

"Whether complainant is entitled to an injunction pending litigation is comparatively a narrow question. In Glascott vs. Lang, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said: 'In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity." In Hadden vs. Dooley, 74 Fed. 429, 431, 20 C. C. A. 494, Judge Shipman in the Circuit Court of Appeals for the Second Circuit, said:

" 'When the questions which naturally arise upon the transactions made them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined by evi-

dence and proofs which have the merit of accuracy'.'"

Numberless cases to the same effect could be cited. Among them we beg to call attention to the following: Russell vs. Farley, 135 U. S. 433, 438; City of Newton vs. Lewis, 79 Fed. 715; San Francisco Gas and Electric Company vs. City and County of San Francisco, 164 Fed. 884, 892-893; Seaboard Air Line Railway Company vs. Railroad Commissioners, 155 Fed. 792, 808; Pacific Telephone & Telegraph Company vs. City of Los Angeles, 192 Fed. 109; Ex parte Young, 209 U. S. 123, 28 S. C. 441; Denver and R. G. R. Company, et al., vs. United States, 124 Fed. 156, 161.

Applying the principles established by the foregoing cases, it is evident that the case presented to the lower court was such as to have necessitated the issuance by it of an interlocutory injunction and that its denial of the appellant's application was such a violation and disregard of the rules of law which it should have followed as to require a reversal of its decision. In every respect, the case at bar presents a case even stronger than the cases cited. The bill of complaint and affidavits established the strongest case of a right in the appellant requiring protection, and which should have been preserved, pending a final hearing, and it was certain that great and irreparable injury must result to the appellant if the interlocutory injunction were denied and that by the granting of the interlocutory injunction the appellees could suffer no injury.

It is, therefore, submitted that the order of the District Court should be reversed and said court be instructed to enter the temporary order prayed for in the bill of complaint and to grant such other or further relief as to this Court may seem fit.

Respectfully submitted,
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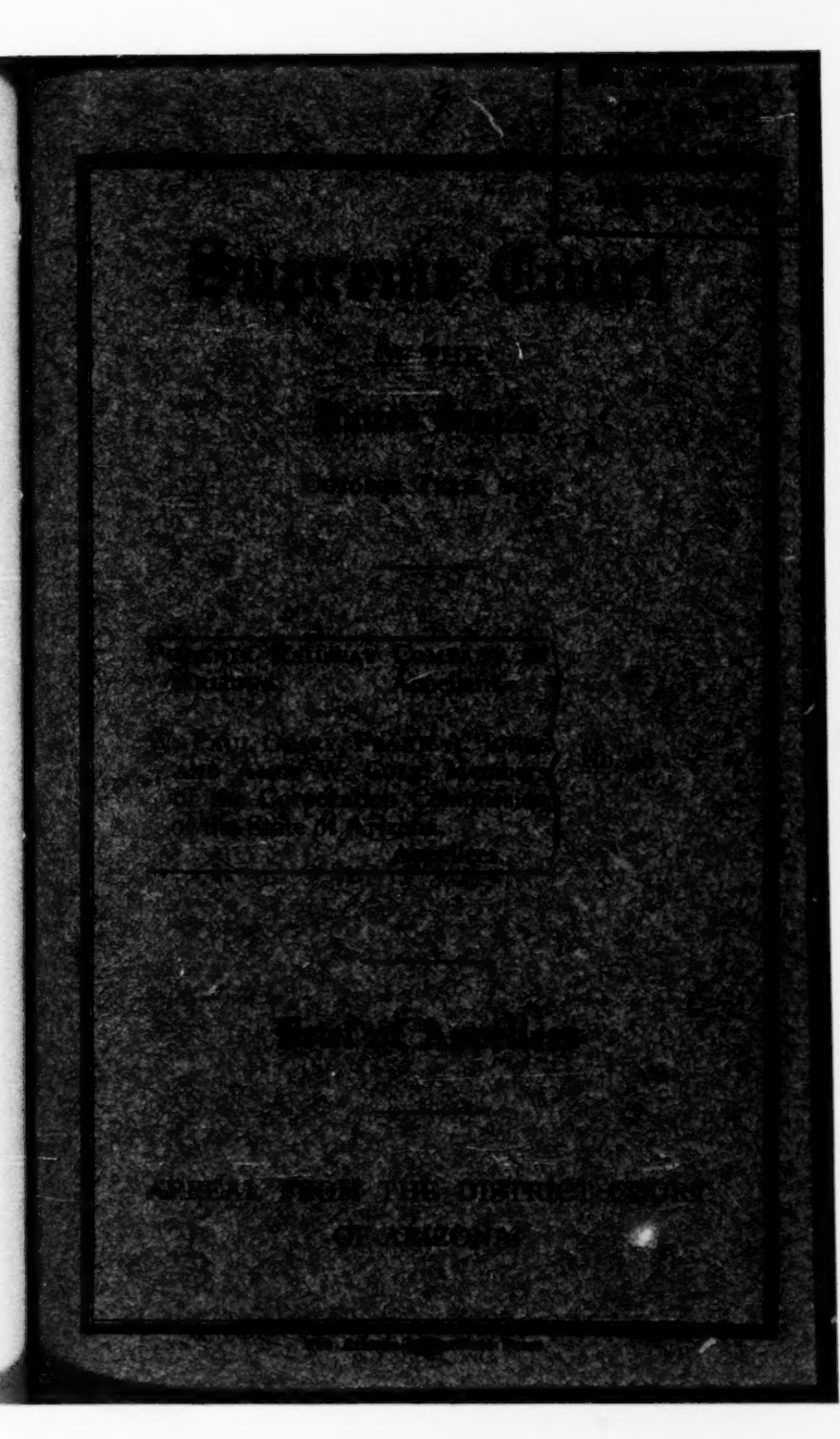

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Supreme Court of the United States

OCTOBER TERM, 1915

No. 48

PHOENIX RAILWAY COMPANY OF ARIZONA, Appellant,
vs.
W. PAUL GEARY, FRANK A. JONES AND AMOS W. COLE, Members of the Corporation Commission of the State of Arizona, Appellees.

STATEMENT OF THE CASE.

The Statement of the Case, set forth in appellant's brief, quite clearly discloses the facts involved in this cause, which may be generally summarized by stating that this appeal involves an order of the District Court of Arizona (convened under Sect. 266 of the Judicial Code, Act of March 3, 1911, Chapt. 231; 36 Stat. 1162 U. S. Comp. Stat. Supp. 1911, p. 236), denying appellant's application for a temporary injunction to restrain the operation of an order of the Corporation Commission of Arizona, requiring the appellant to construct a double track line of street railway on West Washington Street, in the City of Phoenix, Arizona, from the intersection of Seventh Avenue with that street to Seventeenth Avenue. By the opinion of the District Court, so convened, it was determined that appellant's bill of complaint, together with the affi-

davits in support thereof, were insufficient to justify the granting of a temporary injunction (209 Fed. 694). From the order of the District Court, so convened, denying appellant's application for a temporary injunction, an appeal was taken directly to this Court, but in the meanwhile the temporary restraining order, which had theretofore been granted, was continued in force pending this appeal (209 Fed. 699).

ARGUMENT.

The discussions advanced by appellant, in support of its appeal, we think may be narrowed to the propositions that (1) the lower court abused its discretion in refusing to grant the application for a temporary injunction, and (2) the order of the Arizona Corporation Commission complained of was so unreasonable and arbitrary as to deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution. Before discussing these propositions, we desire to call the attention of the Court to the fact that, while the lower court refused to grant appellant's application for an interlocutory injunction, it nevertheless, because of the heavy penalties imposed by statute for a failure to comply with the orders of the Arizona Corporation Commission, retained jurisdiction so that no injustice would be done the appellant while complying with the order (209 Fed. 697). In view of this, the severity of the penalties of the statute for a failure to comply

with the order of the Arizona Corporation Commission was not invoked by the appellant, other than to establish the jurisdiction of the lower court.

The granting or refusing of an injunction lies within the discretion of the court, and should not be exercised except in clear case. *Knoxville vs. Knoxville Water Co., 212 U. S. 1; Ex parte Young, 129 U. S. 123.* Unless, therefore, it can be determined by this Court that the exercise of the power of the Arizona Corporation Commission, now complained of, was so arbitrary and unreasonable as to deny the appellant due process of law, the discretion of the lower court in refusing to grant an interlocutory injunction should not be disturbed.

It has been settled that because the power exists to regulate public utilities, there is no corresponding power to exercise an unreasonable regulation. *Atl. Coastline R. R. Co. vs. North Carolina R. R. Corporation Commission, 206 U. S. 1, and authorities there cited.* With this rule in view, it is necessary to inquire if the order of the Corporation Commission, now complained of, was an unreasonable and arbitrary exercise of the power of that Commission. The bill of complaint and the affidavits disclose that, at the time the order of the Arizona Corporation Commission was promulgated, complainant's property was assessed for taxation at Two Hundred Fifty Thousand ($250,000.00) Dollars, which appellant states to be a low valuation. Upon that valuation the order now complained of required an expenditure of approximately Fourteen Thous-

and ($14,000.00) Dollars. The lower court concluded that an order requiring this amount of expenditure did not appear, from the bill of complaint and the affidavits in support thereof, to be arbitrary and unreasonable. The necessity of the order is apparent, for the reason that complainant's line of railway which was required to be double tracked, not only served a growing district of the City of Phoenix, wherein resided approximately one thousand five hundred ninety-five persons over the age of six years (Affidavit of C. R. Price, p. 66 T. R. and affidavit of J. P. Gould, p. 28 T. R.), but in conjunction served the Carnegie Public Library (Affidavit of Addie P. Ingalls, p. 90 T. R.) and the State Capitol, where are situate all the state governmental offices.

It readily appears to us that a public utility which holds its franchise from one of the municipalities of the state, is not burdened by being compelled to make an expenditure of approximately $14,000.00 upon a taxable valuation of $250,000.00, when it has been determined that such an expenditure is necessary to facilitate the comforts and needs of the people whom it serves.

The bill of complaint alleged that the complainant operated its line of street railway from the period beginning July 1, 1911, and ending July 1, 1912, at a loss of Four Thousand Eight Hundred Ninety-one Dollars and Sixteen Cents ($4,891.16), and for the similar period ending July 1, 1913, at a gain of Two Thousand Three Hundred Twenty-five Dollars and Three Cents ($2,325.03), making a total deficit for the entire

period of Two Thousand Five Hundred Sixty-six Dollars and Thirteen Cents ($2,566.13) (P. 6 T. R.). This allegation was evidently based upon the affidavit of C. E. Newcomber, which was attached to the bill of complaint (p. 22 T. R.). The counter affidavit of W. N. Sangster (p. 87 T. R.), Auditor of the Arizona Corporation Commission, discloses that the complainant operated its line of street railway for the same period at an earning of Eleven Thousand Six Hundred Seventy-eight Dollars and Twenty-three Cents ($11,678.23). Such divergent audits evidently prompted the lower court to conclude that there was an insufficient showing to grant the application for a temporary injunction.

It has been the policy of this Court, in causes which involve the regulation of public utilities by legislative and administrative bodies, not to interfere with their actions, unless there was an unreasonable and arbitrary regulation. This rule was announced by this Court in the case of *San Diego Land & Town Co. vs. National City*, 174 *U. S.* 739-754, as follows:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Again in the case of the *San Diego Land & Town Co. vs. Jasper*, 189 *U. S.* 439, which involved a water rate prescribed by the Board of

Supervisors of San Diego County, California, this Court said:

> "In a case like this we do not feel bound re re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we can not say that it was impossible for a fair-minded board to come to the result which was reached."

While the two cases immediately quoted from involved regulations of rates of a public utility, we perceive that there is no distinction, insofar as the proposition therein announced is applicable, between such a regulation and one which affects the equipment of a public utility. In the case of *Atlantic Coast-Line R. R. Co. vs. North Carolina Railroad Corporation Commission, supra*, in distinguishing the difference between the exercise of legislative powers to establish rates, and an order compelling the corporation to render a service which was essentially its duty to perform, this Court said:

> "This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the more incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was un-

reasonable under the doctrine of *Smyth v. Ames*, 169 *U. S.* 526, 42 *L. ed.* 842, 18 *Sup. Ct. Rep.* 418.

"Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

It will be observed by the Court that the order of the Arizona Corporation Commission complained of, did not require the appellant to extend its line of street railway into a new district, but only provided a double tracking of its line of street railway in a district already served. The reason for promulgating this order grew out of the inadequacy of service then rendered by appellant in that district. The line of appellant's property is already of double track construction on Washington Street to Seventh Avenue. The Arizona Corporation Commission, after a full and complete hearing, had the power to compel the appellant to double track its line, as by the order provided, in order to adequately serve the public. The lower court concluded, and we think rightly, that the order of the Arizona Corporation Commission, which entailed an expenditure admitted

by appellant of approximately $14,000.00, was justifiable because of the obligation of the appellant to adequately serve its patrons in a growing city like Phoenix, and especially in a district of that city wherein the Capitol of the State is located.

In the case of *Buffington vs. Harvey*, 95 *U. S.* 99, this Court held that the granting or the dissolution of a temporary injunction affords no ground of appeal. However, Section 266 of the Judicial Code has authorized an appeal directly to this Court, from an order granting or refusing an interlocutory injunction in the particular cases designated by that section of the Judicial Code, so we apprehend that the case of *Buffington vs. Harvey, supra*, would not, in view of that section of the Judicial Code, exclude this Court from reviewing the discretion exercised by the lower Court in refusing the temporary injunction in the instant case. That case is still authority for the proposition, however, that an interlocutory injunction is an extraordinary remedy, which will only be granted in the clearest cases.

CONCLUSION.

The appellant occupies the streets of the City of Phoenix by the right of franchise. This privilege is tantamount to a licensed monopoly, and as long as it continues there is an obligation to adequately furnish, for the convenience of the public, facilities which will insure safety and convenience. The Arizona Corporation Commission,

after notice and hearing, was of the opinion that the appellant should double track its line from the intersection of Seventh Avenue with Washington Street to Seventeenth Avenue, because of the public need. In view of the fact that a duty is enjoined upon the appellant to adequately serve the public, we contend that the bill of complaint and affidavits in support thereof, when considered in conjunction with the testimony taken before the Arizona Corporation Commission, its order, and the counter-affidavits filed by the appellees, that there is no such showing as will justify this Court in saying that the order of the Arizona Corporation Commission is arbitrary and unreasonable.

For all of which reasons it is respectfully submitted that the order of the District Court, denying appellant's application for a temporary injunction, should be affirmed.

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